86-459

No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

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COOPER INDUSTRIES, INC.,
Petitioner,

v.

I.A.M. NATIONAL PENSION FUND
BENEFIT PLAN A, *et al.*,
Respondents.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

———

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Dated: September 22, 1986

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QUESTION PRESENTED FOR REVIEW

Did the court of appeals err when it required a showing of irreparable harm as a condition of its jurisdiction to review an interlocutory injunction under 28 U.S.C. § 1292(a)(1), contrary to the clear and plain language of that statute?

PARTIES

The parties to the proceeding in the court below were: Cooper Industries, Inc. ("Cooper"), I.A.M. National Pension Fund Benefit Plan A ("IAM Fund"), and Eugene Glover and Lester F. Gettel, Jr., Co-Chairmen of the Board of Trustees of the IAM Fund. The Pension Benefit Guaranty Corporation ("PBGC") appeared as amicus curiae to support the IAM Fund's position on the merits.

This petition is filed on behalf of Cooper. Cooper has no parent company, no non-wholly-owned subsidiaries, and no non-wholly-owned affiliates. Aviall, Inc. is not a named party in the proceeding below, but is a real party in interest allied with Cooper. Aviall, Inc. is a wholly-owned subsidiary of Ryder System, Inc.

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COOPER INDUSTRIES, INC.,
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I.A.M. NATIONAL PENSION FUND
BENEFIT PLAN A, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Cooper Industries, Inc., prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the panel of the court below (App. A, *infra*, pp. 1a-8a) is reported at 789 F.2d 21. The district court's interlocutory order that the court below declined to review is unreported. (App. B, *infra*, pp. 9a-13a.) The district court's decision on the merits, which ruled in Cooper's favor but continued in effect the interlocutory order at issue, is reported at 635 F. Supp. 335.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, pp. 14a-15a) was entered on April 25, 1986. A petition for rehearing and a suggestion for rehearing *en banc* were denied on June 24, 1986. (App. D and E, *infra*, pp. 16a-19a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1292(a)(1) (1982) provides:

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

(App. F, *infra*, p. 20a.)

STATEMENT OF THE CASE

The IAM Fund brought this action to collect a withdrawal liability payment from Cooper under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1451 (1982).[1] Cooper defended on the ground that the IAM Fund's withdrawal liability demand was invalid as a matter of law. Both parties moved for summary judgment. (App. A, *infra*, p. 2a.)

While those motions were pending and without even preliminarily assessing the lawfulness of the IAM Fund's

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[1]For the text of 29 U.S.C. § 1451 (1982), see App. F, *infra*, p. 23a.

demand, the district court entered an order directing that, *pendente lite*, the "defendant comply with the express terms of the MPPAA and make the installment withdrawal liability payment as required by the Plan's notification of July 27, 1984, pursuant to 29 U.S.C. § 1399." (App. B, *infra*, pp. 12a-13a.) Cooper was ordered to make the payment "forthwith." (*Id.* p. 13a.)[2] The district court then ordered additional briefing on Cooper's summary judgment motion. (App. A, *infra*, p. 3a.)

Cooper appealed pursuant to 29 U.S.C. § 1292(a)(1) (1982), asserting that the district court had no power to issue an injunction commanding the payment of money without assessing preliminarily likelihood of success on the merits. The court of appeals agreed with Cooper that the district court's order "clearly meets" the "definition of an injunction under § 1292(a)(1)." (App. A, *infra*, p. 4a.) Nevertheless, the court of appeals held that it lacked jurisdiction to hear the appeal under § 1292(a)(1) because the district court's order did "not result from a specific request for an injunction," and because "Cooper failed to demonstrate any irreparable harm it might suffer if forced to defer its challenge until a final judgment has been entered." (App. A, *infra*, pp. 4a, 8a.)[3]

After Cooper's appeal was dismissed, the district court granted Cooper's summary judgment motion and held the IAM Fund's withdrawal liability demand to be invalid as a matter of law, but continued in effect the interlocutory order at issue. 635 F. Supp. at 337, 341.[4] The IAM

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[2] Cooper made the payment into the registry of the district court pending appeal. (App. A, *infra*, p. 3a n.1.)

[3] Neither the IAM Fund nor the PBGC as amicus curiae challenged the jurisdiction of the court below until the court itself, *sua sponte*, questioned its jurisdiction at argument. (*See* App. A, *infra*, p. 5a n.4.)

[4] The district court retained Cooper's payment in the court registry pending a decision of the IAM Fund whether to make a new withdrawal liability demand. 635 F. Supp. at 341.

Fund has appealed the district court's decision on the merits and Cooper has cross-appealed the continuation of the order at issue. The court below has docketed those appeals as Nos. 86-7015 and 7016.

REASONS FOR GRANTING THE WRIT

The question at issue here is a simple one. The court of appeals has denied a jurisdiction given to it by Congress in 28 U.S.C. § 1292(a)(1) in clear and explicit terms. This raises a question of importance in the procedure of the courts of appeals. The result reached below rewrites the statute and warrants review by this Court—perhaps summary reversal.

The decision below transgresses this Court's admonition to "all courts to see that no unauthorized extension *or reduction* of jurisdiction, direct or indirect, occurs in the federal system." *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955) (citation omitted) (emphasis added). As a consequence, the decision below precludes an employer from challenging an interlocutory order to pay a withdrawal liability demand, even though the illegality of the demand is clear, in derogation of this Court's holding in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982).[5] Ignoring the teachings of *Kaiser Steel*, the district court ordered Cooper to pay the IAM Fund's demand without making a preliminary assessment of Coop-

[5] In *Kaiser Steel*, this Court interpreted 29 U.S.C. § 1145 to mean that an employer must be entitled to raise "illegality defenses" related to a pension plan's entitlement to contributions. "Far from abolishing illegality defenses, § 306(a) [29 U.S.C. § 1145] explicitly requires employers to contribute to pension funds only where doing so would not be 'inconsistent with law.'" *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 87-88 (1982). 29 U.S.C. § 1451(b)—which grants and defines the *judicial* authority to order withdrawal liability payments—requires that a failure to make payments be treated "in the same manner" as a delinquent contribution under 29 U.S.C. § 1145. Thus, this Court's reasoning in *Kaiser Steel* applies with equal force to the IAM Fund's payment demand.

er's defense, which it later held to be meritorious. Acknowledging that the district court's order met the definition of "injunction," the court of appeals nevertheless refused to review it.[6]

Based on a misreading of this Court's decision in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), the court below has announced a new standard for determining the immediate appealability of an interlocutory injunction under 28 U.S.C. § 1292(a)(1). Unless the district court order results from a "specific request for injunctive relief"—presumably, a motion for a preliminary injunction—the party enjoined must show that it will be "irreparably harmed" by the injunction in order to secure immediate review. Only if the order results from a specific request will review be automatic.[7] That standard misconstrues *Carson* and impermissibly restricts the congressional grant of jurisdiction in § 1292(a)(1).

The decision below misreads *Carson* to apply to every interlocutory order that does not result from a specific request for injunctive relief. Nothing in *Carson*, however, even suggests that the appealability of an inter-

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[6] Contrary to the suggestion of the court below (App. A, *infra*, p. 5a), the order at issue may never be reviewable on appeal, unless it can be reviewed in *this* case. The district court's most recent decision finds for Cooper on the merits but continues in effect the interlocutory order against it. Although Cooper has appealed this continuation of the order, it is far from clear that the court below will permit this latest appeal. If an interlocutory order when entered is appealable only upon a showing of irreparable harm, consistency would suggest that the same order when later continued is appealable only upon the same showing. Thus, the dismissal of Cooper's appeal in this case may have foreclosed later review of the order, and, in effect, affirmed it.

[7] The panel conceded that an injunctive order entered in response to a specific request would be immediately appealable as of right—without a showing of "irreparable harm." (App. A, *infra*, p. 4a n.3.) The order here resulted instead from a motion for summary judgment. (App. A, *infra*, p. 3a n.2.)

locutory order should turn on the nature of the request for relief rather than the substance of the district court's order. In *Carson*, the Court examined § 1292(a)(1)'s applicability to an interlocutory order refusing to approve a consent decree that would in turn have provided for permanent injunctive relief. *See Carson*, 450 U.S. at 80-82. While the order did not directly refuse to grant an injunction, the consent decree would have implemented injunctive relief. Thus, by refusing to approve the consent decree, the district court's order indirectly denied injunctive relief.

Explaining that § 1292(a)(1) was designed to permit review of an order that had the "practical effect" of refusing an injunction where it presented a " 'serious, perhaps irreparable, consequence,' " *Carson*, 450 U.S. at 84 (citation omitted), this Court held that the rejection of the consent decree was appealable. Nothing in *Carson*, however, suggests an intention to restrict review of orders that are themselves injunctions.

As the court below acknowledged, "[t]he June 25 order requiring Cooper to make the first installment payment to the Fund clearly meets [the] definition" of an injunction under § 1292(a)(1). App. A, *infra*, p. 4a.) In mandatory language, it grants the substantive relief requested by the IAM Fund's complaint: "Accordingly, it is by the Court this 25th day of June 1985, ORDERED that defendant *shall* make the first installment of its withdrawal liability in the amount of $262,188.00 forthwith. . . ." (App. B, *infra*, p. 13a, emphasis added.) Analytically, then, *Carson* should not be a controlling precedent here. *See Cable Holdings of Battlefield, Inc. v. Cooke*, 764 F.2d 1466, 1471 (11th Cir. 1985).

The court below has not previously felt constrained by *Carson* as it has in this case. In *Gomez v. Turner*, 672 F.2d 134 (D.C. Cir. 1982), the district court granted the plaintiff's motion for partial summary judgment and ordered the District of Columbia police to refrain from

engaging in certain unconstitutional conduct. On appeal, the *Gomez* court recognized its duty to examine its own jurisdiction. In a footnote that did not even mention *Carson*—much less cite it as a "controlling precedent"—the *Gomez* panel held that it had jurisdiction to review the order: "An order granting partial summary judgment is usually considered a nonappealable interlocutory order. . . . Because the subject order granted an injunction, however, this appeal is properly before us pursuant to 28 U.S.C. § 1292(a)(1) (1976)." *Id.* at 138 n.5 (citation omitted).

Like the order held appealable in *Gomez*, the order here grants an injunction. Contrary to the analysis employed by the panel in this case, however, the *Gomez* panel recognized that the form of the request—there as here, a motion for partial summary judgment—does not control the determination of § 1292(a)(1)'s jurisdiction. That recognition directly conflicts with the decision here.[8]

Other courts of appeals have recently expressed confusion as to the meaning of *Carson*. For example, shortly after this Court decided *Carson*, the Third Circuit said

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[8] The two cases cited by the panel in which other panels of the court below have dismissed appeals brought pursuant to § 1292(a)(1)—*United States v. Western Elec. Co.*, 777 F.2d 23 (D.C. Cir. 1985), and *Center for Nat'l Sec. Studies v. CIA*, 711 F.2d 409 (D.C. Cir. 1983)—are both distinguishable. The district court's order in *Western Electric* "passed upon no prayer for relief and resolved no substantive issue." 777 F.2d at 28. Instead, it merely set forth certain housekeeping requirements with which the parties had to comply when making a waiver request. By contrast, the order here granted the very relief requested in the complaint.

Center for National Security Studies is also distinguishable. In that case, the district court's order did not—on its face—refuse an injunction. By granting summary judgment for the CIA on one count, however, it had the "practical effect" of refusing an injunction to the Center. Here, the order directly entered a mandatory injunction compelling one party to pay to the other party the monetary amount sought in the complaint.

that "[n]otwithstanding . . . *Carson* . . . the appealability of a routine interlocutory injunctive order remains unquestioned." *Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443, 447 (3d Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982). More recently, the Third Circuit has suggested that an order which "refused, in part, the . . . motion for an injunction" is appealable only upon the showing required in *Carson*. *Pantry Pride, Inc. v. Retail Clerks Tri-State Pension Fund*, 747 F.2d 169, 170 (3d Cir. 1984). Such confusion is likely to continue.[9]

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[9] *Compare Cable Holdings of Battlefield, Inc. v. Cooke*, 764 F.2d 1466, 1471 (11th Cir. 1985) (citation omitted) (emphasis added) ("By its own terms, *Carson* applies only to interlocutory orders that have 'the *practical effect* of refusing an injunction' ") *with Donovan v. Robbins*, 752 F.2d 1170, 1173 (7th Cir. 1985) ("The source of confusion is that *Carson* seems to be about two different things—the appealability of orders disapproving consent decrees that contain permanent injunctions, and the appealability of orders of any sort that have the same consequences as orders denying preliminary injunctions").

CONCLUSION

To make appealability turn upon the style of a document rather than its content is to invite litigants to use labels to enhance or impair appellate review. The result is uncertainty and multiple appeals, as in this case, rather than "the just, speedy, and inexpensive determination of every action" as envisioned by Fed. R. Civ. P. 1. The use of *Carson* to narrow the appellate jurisdiction granted by 28 U.S.C. § 1292(a)(1) is unwarranted, rewrites the statute and reduces federal jurisdiction without congressional approval.

Cooper respectfully petitions the Court to grant a writ of certiorari to review the decision below of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Dated: September 22, 1986

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5789

I.A.M. NATIONAL PENSION FUND
BENEFIT PLAN A, *et al.*,
Appellees

v.

COOPER INDUSTRIES, INC.,
Appellant

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 84-03346)

Argued March 25, 1986

Decided April 25, 1986

Glenn Summers, with whom *Carl L. Taylor* and *Betty S. Wommack* were on the brief for appellant.

Laura Steinberg, with whom *Roger P. Hunt* and *Robert T. Osgood* were on the brief for appellees.

J. Stephen Caflisch, with whom *Edward R. Mackiewicz* and *Baruch A. Fellner* were on the brief for *amicus curiae* Pension Benefit Guaranty Corporation, urging affirmance.

Before: WALD, MIKVA and EDWARDS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge*: Cooper Industries ("Cooper") appeals from a District Court order requiring it to pay the overdue first installment of "withdrawal liability" payments pursuant to the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381-1405, 1451 (1982). Cooper contends that the District Court erred in ordering the withdrawal liability payments to be made without preliminarily assessing whether such payments were required by law. We do not reach the merits of Cooper's appeal because we conclude that the order being challenged is not appealable at this time.

I. BACKGROUND

The I.A.M. Pension Fund ("Fund") is a multiemployer pension plan within the meaning of the MPPAA. Cooper Industries had, pursuant to various collective bargaining agreements, contributed to the Fund from 1967 until May 25, 1984. After Cooper ceased making payments, the Fund calculated Cooper's "withdrawal liability" pursuant to 29 U.S.C. § 1399 (1982), and notified the company that it owed the Fund $624,343 in withdrawal payments, to be paid in three installments. The first payment of $262,188 was due by September 25, 1984.

When Cooper failed to make the initial payment, the Fund filed suit demanding judgment against Cooper in the amount of the first installment, plus interest from the September 25 payment date. In its answer, Cooper claimed that the requested payment was unlawful under 29 U.S.C. § 1384 because it sought to impose liability for operations sold to another company. The company also counterclaimed for an injunction against the enforcement of the Fund's withdrawal liability demand. Both parties subsequently moved for summary judgment.

On June 25, 1985, the District Court entered an order in response to the cross-motions for summary judgment

requiring Cooper to pay the overdue first installment of withdrawal liability to the Fund, with interest, pending resolution of its counterclaim.[1] The District Court concluded that "withdrawal liability installments must be made despite the presence of legal challenges as to the correctness of those determinations by a defendant employer." District Court Op. at 3. The June 25 order stated that a later order would address Cooper's claim that the payments were incorrectly assessed. Three days later, on June 28, the District Court entered an order rejecting the Fund's contention that Cooper was required to arbitrate the withdrawal liability issue and requesting additional briefing on Cooper's motion for summary judgment. Cooper appeals only from the June 25 order.

II. APPEALABILITY

Cooper appeals the June 25 order pursuant to 28 U.S.C. § 1292(a)(1) (1982), which grants appellate courts jurisdiction over appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions." Our first task, then, is to assess whether the District Court's order is properly characterized as an order granting an injunction.[2]

The District Court order did not purport to grant an express request for injunctive relief. The court had be-

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[1] The $262,188 plus interest is currently deposited with the Registry of the Court pending resolution of this appeal.

[2] The Fund has characterized the District Court's order as one granting partial summary judgment or, more accurately, as one granting the Fund's motion for summary judgment without reaching Cooper's motion. Whether or not that characterization is accurate is irrelevant for purposes of § 1292(a)(1). While an order granting partial summary judgment is ordinarily not appealable, such an order can be appealed pursuant to § 1292(a)(1) if it grants or denies an injunction. Gomez v. Turner, 672 F.2d 134, 138 n.5 (D.C. Cir. 1982). The dispositive question for reviewability purposes is therefore whether an injunction was granted.

fore it cross-motions for summary judgment, neither of which specifically requested an injunction. When a district court order does not result from a specific request for an injunction, however, an appellate court may still hear an appeal from that order if it has the "practical effect" of granting or denying an injunction. *Construction Laborers Pension Trust* v. *Cen-Vi-Ro Concrete Pipe & Products Co.*, 776 F.2d 1416, 1421-22 (9th Cir. 1985). Here we have no problem concluding that the June 25 order had the practical effect of granting an injunction. The definition of an injunction under § 1292(a)(1) is broad: it is any order "directed to a party, enforceable by contempt, and designed to accord or protect, 'some or all of the substantive relief sought by a complaint' in more than preliminary fashion." *United States* v. *Western Electric Co.*, 777 F.2d 23, 28 n.12 (D.C. Cir. 1985) (citation omitted). The June 25 order requiring Cooper to make the first installment payment to the Fund clearly meets this definition.

In order to be appealable under § 1292(a)(1), however, an order which has the practical effect of granting an injunction must also meet the requirements of *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981).[3] Under

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[3] *Carson* does not apply to an order clearly granting or denying a specific request for injunctive relief; such orders are always appealable under § 1292(a)(1). Cable Holdings of Battlefield, Inc. v. Cooke, 764 F.2d 1466, 1471 (11th Cir. 1985); Donovan v. Robbins, 752 F.2d 1170, 1174 (7th Cir. 1985). The *Carson* requirements also do not apply to district court orders which have the practical effect of granting or denying an injunction if such orders go to the merits of a case. Such injunctive orders are immediately appealable without a showing of irreparable harm if they "affect predominantly all of the merits" of the case. Center for National Security Studies v. CIA, 711 F.2d 409, 412-13 (D.C. Cir. 1983). Because the June 25 order granted only interim relief and expressly declined to address the merits of Cooper's defense and counterclaim, it cannot be said to have affected predominantly all of the merits of the case.

Carson, such an order is appealable only if it "might have a 'serious perhaps irreparable, consequence,' and [if] the order can be 'effectually challenged' only by immediate appeal." *Id.* at 84; *see Western Electric*, 777 F.2d at 29. In this case, Cooper has not come close to showing that the order might cause irreparable harm and therefore the order is not immediately appealable.

Because Cooper failed to identify *Carson* as a controlling precedent,[4] the company made no allegations at all of irreparable harm in its briefs. Pressed at oral argument, counsel for Cooper claimed that unless the June 25 order is reviewed now, it would merge into the final judgment and thus become nonreviewable as a separate order on final appeal. In general, however, when an interlocutory order is not appealable and so merges into the final judgment, it *is* open to review on appeal from that judgment. *Aaro, Inc.* v. *Daewoo International (America) Corp.*, 755 F.2d 1398, 1400 (11th Cir. 1985). Even if Cooper is correct and the order would become moot or otherwise nonreviewable at the time of appeal from the final judgment, Cooper must still show irreparable harm. *Carson* requires both a showing that the order can be effectually challenged only on immediate appeal *and* a showing of irreparable harm. *General Electric*, 777 F.2d at 29-31.

Counsel for Cooper argued that the company suffered irreparable harm because the District Court had abdicated its judicial duty to evaluate the merits of its counterclaim before ordering interim payments on the withdrawal liability. While a deserving litigant is always

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[4] In all fairness, we should note that the Fund failed, until oral argument before this court, to raise the issue of whether the order was not appealable because of Cooper's failure to allege irreparable harm. But even if the Fund had never caught up with this issue, this court would have been obliged to address it since in the absence of jurisdiction under § 1292(a)(1) we lack any authority to review the order. *See* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981).

harmed if judicial relief is delayed, such harm does not automatically rise to the irreparable level. Formidable as it is, the cost and delay associated with modern-day litigation simply does not establish irreparable harm. *Western Electric*, 777 F.2d at 30. As the Supreme Court has succinctly put it, irreparable harm must be "greater than the harm suffered by any litigant forced to wait until the termination of the [proceedings] before challenging interlocutory orders it considers erroneous." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379 n.13 (1981).[5]

Neither is Cooper irreparably harmed because it must make the withdrawal liability payments directly to the Fund, rather than to the court or an escrow account. Adequate safeguards exist to insure that Cooper will promptly recover any overpayment in a lump sum with interest. *See* 29 C.F.R. § 2644.2(d) (1985). Cooper is not at risk of losing its money or even the time value of that money since it will receive interest on the amount refunded.

Finally, our conclusion that Cooper has failed to show irreparable harm stemming from the June 25 order is

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[5] The Court's statement was made in a case involving the collateral order doctrine, which originated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Under that doctrine, some orders which do not amount to final judgments may nevertheless be appealable as "final decisions" pursuant to 28 U.S.C. § 1291 (1982). The Supreme Court has "defined this limited class of final 'collateral orders' . . . [as those which] 'conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment.'" *Firestone*, 449 U.S. at 375 (citation omitted). The Court has read the third prong of this test to require a showing of irreparable harm. *Id.* at 376. The requisite showing of irreparable harm is similar to that required in cases involving interlocutory injunctive orders. *Compare In re San Juan Star Co.*, 662 F.2d 108, 112 (1st Cir. 1981) *with General Electric*, 777 F.2d at 30. Thus, the June 25 order would similarly be unappealable under the collateral order doctrine.

not altered by the company's citation to *Pantry Pride, Inc.* v. *Retail Clerks Tri-State Pension Fund*, 747 F.2d 169 (3d Cir. 1984). The court in *Pantry Pride* held that a district court's *denial* of a pension fund's request for an order requiring an employer to make interim withdrawal liability payments was reviewable under § 1292(a)(1). *Id.* at 171. The court found there that the fund would be irreparably harmed by the denial of withdrawal liability payments because the statutory scheme enacted by Congress in the MPPAA was specifically designed "to insure that the flow of employer withdrawal liability payments was not delayed by an employer disputing liability." *Id.* at 171.[6] Congress showed no comparable solicitude for the cash flow problems of employers. Indeed, Cooper's counsel conceded at oral argument that, under the MPPAA's statutory scheme, any assessment of irreparable harm flowing from an injunctive order regarding interim withdrawal liability payments would almost certainly favor the pension fund. Thus an order refusing to require interim withdrawal liability payments is appealable because irreparable harm will result; no such harm flows from an order requiring such payments.[7]

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[6] The *Pantry Pride* court also held that "the loss of the important statutory right to interim payments cannot be effectively reviewed once a final order has been made." 747 F.2d at 171.

[7] There are other, analogous contexts in which an immediate appeal will be allowed from an order denying a request for interim relief but no such appeal will be allowed from an order granting such relief. For example, under the collateral order doctrine courts will often allow immediate appeal from orders denying a grant of prejudgment security, but deny appeal from orders enforcing such security. C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure*, § 3911 at 492 (1976). When a plaintiff cannot obtain security, irreparable harm is threatened because it may later be impossible to collect on a judgment. A defendant is not similarly at risk because he will get his money back, with interest, if he prevails.

III. Conclusion

While the District Court's June 25 order had the practical effect of an injunction for purposes of § 1292(a)(1), it was not an appealable interlocutory order because Cooper failed to demonstrate any irreparable harm it might suffer if forced to defer its challenge until a final judgment has been entered. This court lacks jurisdiction to hear Cooper's appeal of the June 25 order and that appeal is accordingly

Dismissed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3346

I.A.M. NATIONAL PENSION FUND
BENEFIT PLAN A, *et al.*,
Plaintiffs

v.

COOPER INDUSTRIES, INC.,
Defendant

[Filed June 25, 1985]

MEMORANDUM ORDER

This matter is before the Court on the parties' cross-motions for summary judgment, supplemental briefing on the motions, and the entire record herein. For the reasons set forth below, the Court orders that defendant pay the overdue first installment of withdrawal liability to the Plan.

A brief sketch of the undisputed facts in this case is necessary. Plaintiff I.A.M. National Pension Fund, Benefit Plan A ("the Plan") is a multiemployer pension plan within the meaning of 29 U.S.C. § 1002(37). Plaintiffs Eugene Glover and Lester F. Gettle, Jr. are Co-chairmen of the Board of Trustees of the Plan and are fiduciaries within the meaning of 29 U.S.C. § 1132(a)(3). Plaintiff Board of Trustees of the I.A.M. National Pension Fund

is the administrator of the Plan within the meaning of 29 U.S.C. § 1002(16).

Defendant Cooper Industries, Inc. ("Cooper") is an "employer" within the meaning of 29 U.S.C. § 1002(5). Cooper, through one or more of its divisions, was obligated under the terms of one or more collective bargaining agreements to contribute to the Plan during the years 1967 to 1984.

On May 25, 1984, Cooper ceased its contributions to, and withdrew from, the Plan within the meaning of 29 U.S.C. § 1383.

By letter dated July 27, 1984, and received July 30, 1984, Cooper was notified pursuant to 29 U.S.C. § 1399 (b)(1) that its withdrawal liability to plaintiff was $624,182.00, payable in three installments with the initial payment of $262,188.00 due on September 25, 1984.

Cooper did not make the first installment payment due on September 25, 1984. By letter dated September 26, 1984, it was notified by the Plan that its first installment of withdrawal liability was overdue.

On November 1, 1984, the Plan filed this action against Cooper to compel payment of the first installment of defendant's withdrawal liability, plus interest, liquidated damages and attorney's fees and costs.

On December 17, 1984, defendant answered plaintiff's complaint. It admitted the facts as outlined above, except as to the withdrawal liability sought by plaintiffs. Defendant states in its answer that plaintiffs' notification of liability was unlawful because it seeks to impose liability upon defendant for operations sold to and operated by Aviall, Inc., allegedly in violation of 29 U.S.C. § 1384.

In its answer defendant also pursues a counterclaim, seeking, *inter alia*, to enjoin plaintiffs from attempting to impose liability for operations sold and operated in compliance with 29 U.S.C. § 1384.

This memorandum order does not address defendant's counterclaim. The Court will address that claim in a subsequent opinion. The only matter that is at issue before this Court presently is whether defendant must pay withdrawal liability installments without regard to the correctness of the underlying withdrawal liability computation. It is this Court's conclusion that withdrawal liability installments must be made despite the presence of legal challenges as to the correctness of those determinations by a defendant employer.

Section 4219 of the Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA") specifically states that "[w]ithdrawal liability *shall be payable* in accordance with the schedule set forth by the plan sponsor . . . beginning no later than 60 days after the date of the demand *notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.*" 29 U.S.C. § 1399(c)(2) (emphasis added). Although defendant has chosen not to arbitrate its challenge of the statutory correctness of the Plan's withdrawal liability determination, the MPPAA's section on arbitration is instructive of the intent of Congress to require payment of withdrawal liability pending the outcome of any appeal from a pension plan's withdrawal liability determination. The arbitration section of the MPPAA states in pertinent part:

> Payments shall be made by an employer in accordance with the determination made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination.

29 U.S.C. § 1401(d).

Congress has specifically intended to protect the financial integrity of multiemployer pension plans. *See* H.R.

Rep. No. 96-869, Part I, 96th Cong., 2d Sess. 51-52, *reprinted in*, 1980 U.S. Code Cong. & Ad. News 2918, 2919-20. By requiring payment of withdrawal liability determinations while an employer challenged those determinations, Congress effectively "shift[ed] the economic burdens of withdrawal back to the withdrawing employer." *Dorn's Transportation, Inc. v. I.A.M. National Pension Fund Benefit Plan A*, 578 F. Supp. 1222, 1232 (D.D.C. 1984), *aff'd mem.*, 753 F.2d 166 (D.C. Cir. 1985). As the court in *Trustees of Western Teamsters Pension Fund v. Arizona-Pacific Tank Lines*, 4 EBC 2355 (N.D. Cal. 1983), explained:

> When Congress enacted ERISA it was concerned with safeguarding the fiscal health of employee pension funds. Consequently, it included various provisions in the statute designed to prevent employers from jeopardizing the solvency of the funds by delaying payment while disputes were litigated in the Courts. . . . In the legislative report accompanying the 1980 amendments to ERISA, the House Committee explained: "These rules [imposing strict liability] are necessary in order to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligations by refusing to pay and forcing the plan sponsor to prove every element involved. . . . The committee believes it is extremely important that a withdrawn employer begin making the annual payments. . . ."

Id. at 2356-57 (quoting H.R. Rep. No. 96-869, Part I, 96th Cong., 2d Sess. 86, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 2954), *cited in United Engine & Machine Co. v. I.A.M. National Pension Fund, Benefit Plan C*, No. C-82-2032 (N.D. Cal. Jan. 25, 1984).

For the reasons set forth, the Court orders that defendant comply with the express terms of the MPPAA and

make the installment withdrawal liability payment as required by the Plan's notification of July 27, 1984, pursuant to 29 U.S.C. § 1399.

Accordingly, it is by the Court this 25th day of June 1985,

ORDERED that defendant shall make the first installment of its withdrawal liability in the amount of $262,-188.00 forthwith; and it is further

ORDERED that interest from September 25, 1984, the due date of the first installment, shall also be paid.

/s/ June L. Green
JUNE L. GREEN
U. S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

September Term, 1985

Civil Action 84-03346

No. 85-5789

I.A.M. NATIONAL PENSION FUND
BENEFIT PLAN A, *et al.*,
Appellees

v.

COOPER INDUSTRIES, INC.,
Appellant

Appeal from the United States District Court
for the District of Columbia

[Filed April 25, 1986]

Before: WALD, MIKVA and EDWARDS, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of

Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the appeal herein is hereby dismissed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

FOR THE COURT

/s/ George A. Fisher/rab
GEORGE A. FISHER
Clerk

Date: April 25, 1986

Opinion for the Court filed by Circuit Judge Wald.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1985

Civil Action 84-03346

No. 85-5789

I.A.M. NATIONAL PENSION FUND
BENEFIT PLAN A, *et al.*,

v.

COOPER INDUSTRIES, INC.,
Appellant

[Filed June 24, 1986]

Before: WALD, MIKVA and EDWARDS, *Circuit Judges*

ORDER

Upon consideration of appellant's petition for rehearing and of appellant's request for leave to file a supplemental memorandum in support thereof, it is

ORDERED, by the Court, that the Clerk file appellant's lodged supplemental memorandum. And, it is

FURTHER ORDERED, by the Court, that the petition for rehearing is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1985

Civil Action 84-03346

No. 85-5789

I.A.M. NATIONAL PENSION
BENEFIT PLAN A, *et al.*,

v.

COOPER INDUSTRIES, INC.,
Appellant

[Filed June 24, 1986]

Before: ROBINSON, *Chief Judge;* WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA, STARR, SILBERMAN and BUCKLEY, *Circuit Judges*

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court and no member has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court, *en banc*, that appellant's suggestion is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX F

28 U.S.C. § 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay

proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When any judge of the United States Claims Court, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its

discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Claims Court, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Claims Court or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, § 49, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348; Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770; Apr. 2, 1982, Pub. L. 97-164, § 125, 96 Stat. 36.)

29 U.S.C. § 1145. Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

(Pub. L. 93-406, title I, § 515, as added Pub. L. 96-364, title III, § 306(a), Sept. 26, 1980, 94 Stat. 1295.)

29 U.S.C. § 1451. Civil actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process

An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be

served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

(f) Time limitations

An action under this section may not be brought after the later of—

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation

A copy of the complaint in any action under this section or section 1401 of this title shall be served upon the corporation by certified mail. The corporation may intervene in any such action.

(Pub. L. 93-406, title IV, § 4301, as added Pub. L. 96-364, title I, § 104(2), Sept. 26, 1980, 94 Stat. 1263.)

Supreme Court, U.S.
FILED
OCT 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-459

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COOPER INDUSTRIES, INC.,
Petitioner,

v.

I.A.M. NATIONAL PENSION FUND
BENEFIT PLAN A, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE I.A.M. NATIONAL PENSION FUND, *et al.*, IN OPPOSITION

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17 pp

RESPONDENTS' STATEMENT OF QUESTION PRESENTED FOR REVIEW

Was the court of appeals correct in holding that 28 U.S.C. § 1292(a)(1) authorizes immediate appeal only from orders granting or refusing motions for preliminary injunctions and orders having the same serious, perhaps irreparable, consequence as orders granting or refusing motions for preliminary injunctions?

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IN THE

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BENEFIT PLAN A, *et al.*,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE I.A.M. NATIONAL PENSION FUND, *et al.*, IN OPPOSITION

RESPONDENTS' STATEMENT OF THE CASE

Respondents commenced this action to compel the payment of withdrawal liability which they had assessed against petitioner pursuant to the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381, *et seq.* Respondents' complaint sought to collect only the first installment of petitioner's withdrawal liability, inasmuch as only that installment payment was past due at the time the complaint was filed. The complaint sought "judgment against defendants" in the amount of the then-delinquent installment payment, plus interest and liquidated damages on that amount, and

attorney's fees, all in accordance with 29 U.S.C. § 1399 (c) (5) and 29 U.S.C. § 1132(g) (2). It did not specifically request injunctive relief.[1]

Petitioner's answer admitted that respondents had assessed withdrawal liability against petitioner, and that the first installment payment required by that assessment had not been made when due. Petitioner alleged, however, that respondents' withdrawal liability calculation and assessment against it was incorrect because that calculation had included a facility petitioner had sold in ostensible compliance with MPPAA's "sale of assets" provisions, 29 U.S.C. § 1384. Petitioner asked the court to dismiss respondents' complaint and, in a counterclaim incorporated in its answer, to declare the assessment unlawful and permanently enjoin respondents from attempting to enforce it.

Both parties moved for summary judgment, and on June 25, 1985, the district court entered an opinion and order, Pet. App. B at 9a-13a, which addressed only respondents' motion. Concluding that MPPAA requires employers who have challenged a pension plan's assessment of withdrawal liability to pay the assessed withdrawal liability on the schedule established by the plan while the challenge is pending, the court ordered petitioner to pay respondents the then-past due withdrawal liability installment. In holding that MPPAA required payment of withdrawal liability "in accordance with the schedule set forth by the plan sponsor," 29 U.S.C. § 1399(c) (2), the court's June 25, 1985, order granted respondents full final relief on their claim for immediate payment. That order was interlocutory only in the sense that it did not finally dispose of all claims in the case.[2] In subsequent orders the

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[1] The complaint contained the standard prayer for "[s]uch other and further legal or equitable relief as the Court deems appropriate."

[2] The court did not characterize its order as preliminary, interlocutory, *pendente lite*, or in any respect temporary. Pet. App. B at 9a-13a.

court ruled, over respondents' objection, that even though petitioner had waived its statutory right to arbitrate its challenge to respondents' withdrawal liability assessment, it nevertheless remained free to litigate that challenge in court.[3] Having concluded that it was free to make a *de novo* determination of the correctness of respondents' assessment, the court further concluded that that assessment had been improperly calculated and could not be enforced. The court directed respondents to recalculate petitioner's withdrawal liability, and to refund from the installment payment petitioner previously made, any sum in excess of the newly-calculated withdrawal liability. *I.A.M. National Pension Fund v. Cooper Industries, Inc.*, 635 F. Supp. 335 (D.D.C. 1986).

Petitioner's attempt to take an interlocutory appeal from the June 25, 1985, order produced the opinion to which the instant petition is directed. Cross appeals from the district court's final order directing respondents to recalculate petitioner's withdrawal liability have been docketed. Pet. 3-4.

REASONS FOR DENYING THE WRIT

Petitioner asks this Court to reverse the court of appeals' dismissal for lack of jurisdiction of its appeal from the district court's grant of partial summary judgment to respondents. Petitioner claims reversal is necessary (Pet. 4) because the dismissal of its appeal "has denied a jurisdiction given to [the court of appeals] by Congress in 28 U.S.C. § 1292(a)(1) in clear and explicit terms." That error is, in petitioner's view (Pet. 5), rooted in the court of appeals' "misreading of this Court's decision in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981),"

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[3] 29 U.S.C. § 1401(b)(1) provides in part that "[i]f no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor."

and the consequent erroneous promulgation by the court of appeals of a "new standard for determining the immediate appealability of an interlocutory injunction under 28 U.S.C. § 1292(a)(1)."

The only unauthorized "new standard for determining the immediate appealability" of such orders in this case is the one petitioner now urges upon this Court.[4] On petitioner's view of the scope of § 1292(a)(1), litigants would be entitled immediately to appeal from *any* injunction, whether or not that injunction had been issued upon a showing of a likelihood of irreparable harm preliminary to a determination of the merits. Because section 1292(a)(1) was never meant to confer such a right, and has never been so construed by this Court, the court of appeals' dismissal was quite correct. Petitioner points to no decision in which a different court of appeals has adopted the view it here espouses. Its claim (Pet. 7-8) that other courts' "confusion as to the meaning of *Carson*" requires this Court's review of this case bespeaks only petitioner's own confusion about the policy considerations upon which the general prohibition against piecemeal appeals is based. The petition should be denied.

1. Petitioner's confusion is readily identified in its articulation of the asserted "new standard" which it claims was erroneously imposed by the court of appeals. Thus petitioner characterizes the court of appeals' opinion (Pet. 5) as follows:

> Unless the district court order [from which interlocutory appeal is taken] results from a "specific re-

[4] So far as the court of appeals' opinion reflects, petitioner never argued in that court that it was not required to show that a "serious, perhaps irreparable, consequence," *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955) (footnote omitted), might result if no interlocutory appeal were available. The argument petitioner now commends to this Court's attention appears to be little more than an afterthought, prompted by the court of appeals' rejection of petitioner's attempt to meet the *Carson* test. *See* Pet. App. A at 5a-7a.

> quest for injunctive relief"—presumably, a motion for a preliminary injunction—the party enjoined must show that it will be "irreparably harmed" by the injunction in order to secure immediate review .... That standard misconstrues *Carson* and impermissibly restricts the Congressional grant of jurisdiction in § 1292(a)(1).

Under this formulation, according to petitioner, a litigant enjoined at any stage of trial court proceedings except in response to a motion for preliminary injunction faces an impediment to immediate appeal which is not imposed when the injunction results from such a motion. In fact, of course, the "new" standard to which petitioner objects is not new at all. Analytically, the distinction between an injunctive order entered in response to a motion for preliminary injunction and such an order entered after a merits determination, such as the grant of partial summary judgment at issue in this case,[5] is no more than a recognition that the former instance is one in which the movant must assert the danger of irreparable harm in support of his motion, while dispositive motions addressed to the merits of a claim do not require such a showing.

In *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176 (1955), this Court noted that the "exception to the requirement of finality," *id.* at 180, represented by what is now 28 U.S.C. § 1292(a)(1), was evidently rooted in a Congressionally-perceived need

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[5] The court of appeals' conclusion (Pet. App. A at 4a) that the district court's June 25, 1985, order was an injunction may be open to question. That order commanded only that a partial withdrawal liability payment already past due and owing be paid. Pet. App. B at 9a. *Compare Pantry Pride, Inc. v. Retail Clerks Tri-State Pension Fund*, 747 F.2d 169, 171 (3d Cir. 1984) ("[T]he Fund requested . . . that the court compel Pantry Pride to make future payments according to the schedule in its prior demand which, construed liberally, is a request for an injunction.").

> to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.

Id. at 181 (footnote omitted). An interlocutory order entered in response to a motion for preliminary injunction is self-evidently an order "of serious, perhaps irreparable, consequence." Only upon a showing that irreparable harm may result before the merits of his claim can be determined will a movant be granted preliminary injunctive relief. *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *Sampson v. Murray*, 415 U.S. 61, 86-88 (1974); *cf.* Rule 65(b), Fed. R. Civ. P. (temporary restraining order may be issued only upon a showing "that immediate and irreparable injury, loss or damage will result to the applicant"). Thus, every district court order which results from a specific request for preliminary injunctive relief is, by definition, an order entered after the movant has shown (where the injunction is granted) or has unsuccessfully attempted to show (where the injunction is denied), "that it will be 'irreparably harmed'" (Pet. 5), if the injunctive relief it seeks is not granted. In these circumstances, but *only* in these circumstances, section 1292(a)(1) permits immediate appeal of such orders without any additional threshold showing of "irreparable harm" precisely *because* a showing of such harm is prerequisite to the granting of the preliminary injunction in the district court. Orders granting or denying such motions are thus *always*, by definition, "orders of serious, perhaps irreparable, consequence." *Baltimore Contractors*, 348 U.S. at 181.

It was surely this self-defining characteristic the court of appeals had in mind when it stated (Pet. App. A at 4a, n. 3) that

> *Carson* does not apply to an order clearly granting or denying a specific request for injunctive relief; such orders are always appealable under § 1292(a)(1).

While the court did not refer explicitly in this passage to specific requests for *preliminary* injunctive relief, examination of the authorities the court cited at this point confirms that the court's reference was to preliminary injunctions.[6] Petitioner, moreover, does not dispute this premise; it presumes (Pet. 5), correctly we believe, that the court's reference to a "specific request for injunctive relief" was, in fact, a reference to "a motion for a preliminary injunction."

As petitioner concedes, the order from which it appealed did not result from a motion for preliminary injunction, but from a motion for summary judgment. Pet. 5, n. 7; Pet. App. A at 3a, n. 2. Unlike a motion for preliminary injunction, which is based upon the movant's apprehension of suffering irreparable harm before his claim has been adjudicated, a motion for summary judgment seeks a final determination that the movant is "entitled to a judgment as a matter of law." Rule 56(c), Fed. R. Civ. P., and does not depend upon a prerequisite claim of irreparable harm. Clearly then, the court of appeals' consideration of the "nature of the request for relief" is not, as petitioner suggests (Pet. 5-6), a meaningless subordination of substance to form. To the contrary, the "nature of the request" reliably informs the

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[6] *See Cable Holdings of Battlefield, Inc. v. Cooke*, 764 F.2d 1466, 1471 (11th Cir. 1985) ("[T]he district court *explicitly* denied Cable Holdings' motion for a preliminary injunction . . . . Hence, the interlocutory order in this case fits squarely within the plain language of § 1292(a)(1) and *Carson* is inapposite") (emphasis in original), and *Donovan v. Robbins*, 752 F.2d 1170 (7th Cir. 1985), at 1173 ("A request for a permanent injunction does not have the emergency character of a request for a preliminary injunction, which requires the plaintiff to show that he will suffer irreparable harm if the request is denied"), and 1174 ("*Carson* interprets *Switzerland Cheese Ass'n* [*v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966)] to hold that an interlocutory order refusing a permanent injunction is appealable immediately if but only if the order has the same effect ('serious, perhaps irreparable, consequence . . .') as the denial of a preliminary injunction.").

appellate court whether the appeal is one which, by definition, implicates the "serious, perhaps irreparable, consequence," *Baltimore Contractors*, 348 U.S. at 181, necessary to establish appellate jurisdiction under § 1292(a)(1), or whether the court must independently determine whether such consequences are implicated. The teaching of the *Baltimore Contractors/Carson* synthesis is that the appellate court must, one way or another, be satisfied that interlocutory appeal is necessary to protect appellant against the prospect that adherence to the "rule of finality," *Baltimore Contractors*, 348 U.S. at 181, would expose it to "serious, perhaps irreparable, consequence," *id.* When the district court context is itself sufficient to satisfy this test, as it is whenever the order sought to be appealed is entered in response to a motion for preliminary injunction, no further inquiry by the appellate court is required to establish appellate jurisdiction. Otherwise, the *Carson* test must be applied by the appellate court before jurisdiction under § 1292(a)(1) is established. *Shanks v. City of Dallas*, 752 F.2d 1092, 1096-97 (5th Cir. 1985).

The analysis applied by the court of appeals was entirely consistent with the foregoing principles. Because the order from which petitioner sought to appeal was not entered in response to a motion for preliminary injunction, the court of appeals was obliged independently to determine whether that order nevertheless was one which

> might have a "serious, perhaps irreparable, consequence," and [which] can be "effectually challenged" only by immediate appeal.

Carson, 450 U.S. at 84. The court concluded and, indeed, petitioner conceded (Pet. App. A at 7a), that petitioner was not threatened with irreparable harm.[7] Thus com-

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[7] The court also concluded that petitioner could not meet the second prong of the *Carson* test. That conclusion is unassailable, as the pendency of the cross-appeals filed by petitioner and respondents from the district court's final order attests. *See* p. 3, *supra*.

pelled to concede its inability to demonstrate compliance with the *Baltimore Contractors/Carson* standards, petitioner now argues for the first time that those standards do not apply. The argument is clearly without support in any of this Court's decisions, and obviously is not worthy of the Court's attention.

2. Petitioner makes no claim that the court of appeals' decision is "in conflict with the decision of another federal court of appeals." U.S. Sup. Ct. Rule 17.1(a). The most that can be said of petitioner's argument on this point is that it claims inconsistency within the Court of Appeals for the District of Columbia Circuit and "confusion" within the Court of Appeals for the Third Circuit. Neither claim is sound.

Petitioner points first to the footnoted discussion of appellate jurisdiction in *Gomez v. Turner*, 672 F.2d 134, 138, n. 5 (D.C. Cir. 1982), as evidence of important disarray on this issue within the District of Columbia Circuit. The language in *Gomez* upon which petitioner relies does, indeed, appear to predicate jurisdiction under 28 U.S.C. § 1292(a)(1) of an appeal from an injunction granted on motion for summary judgment. There is, however, no suggestion in the court's opinion that jurisdiction was contested by the appellee. Nor, we think, is there any doubt that, had the *Carson* test been applied in *Gomez*, it would easily have been met. The district Court in *Gomez* had, on constitutional grounds, permanently enjoined the Metropolitan Police Department of the District of Columbia from engaging in the practice of making noncoercive pedestrian "contacts." *Gomez*, 672 F.2d at 138-39. While the injunction was in force therefore, District of Columbia police officers were restrained by its terms from conducting certain routine investigative interviews, and perhaps even from responding appropriately to emergency situations. Id. at 142-44, 146. The injunction in *Gomez* thus was plainly one which

> might have a "serious, perhaps irreparable, consequence," and [could] be "effectually challenged" only by immediate appeal . . . .

Carson, 450 U.S. at 84. The *Gomez* court's failure expressly to apply the easily-satisfied *Carson* test, when no challenge to its appellate jurisdiction had been raised, clearly does not require this Court to review the decision in this case, in which the court of appeals properly *did* apply the *Carson* standard.[8]

Nor does petitioner's claim of "confusion" (Pet. 7-8) within the Third Circuit require this Court's attention. *Tokarcik v. Forest Hills School District*, 665 F.2d 443 (3d Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982), like this case, involved an injunction issued on a motion for summary judgment. Like the court of appeals in this case, the Third Circuit tested its own jurisdiction by independently inquiring into the threat of irreparable harm if immediate appeal were denied. *Id.* at 446-47. The court in *Pantry Pride, Inc. v. Retail Clerks Tri-State Pension Fund*, 747 F.2d at 170, with which petitioner attempts, Pet. 8, to contrast *Tokarcik*, conducted a similar inquiry. The *Tokarcik* court's statement, 665 F.2d at 447, that "appealability of a routine interlocutory injunctive order remains unquestioned," plainly refers to injunctions issued on motions for preliminary injunction,

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[8] Where, as in both *Gomez* and this case, the order appealed from finally disposes of one or more, but not all, claims in the action, and is interlocutory only in the sense that it leaves other claims unresolved, the question of immediate appealability might more appropriately be governed by Fed. R. Civ. P. 54(b). Not surprisingly, inasmuch as both § 1292(a)(1) and Rule 54(b) represent limited exceptions to the general rule of finality, the showing required under Rule 54(b) is closely analogous to the *Carson* test under § 1292(a)(1). *See Ansam Associates, Inc. v. Cola Petroleum Ltd.*, 760 F.2d 442, 445 (2d Cir. 1985); *Burlington Northern Railroad Co. v. Bair*, 754 F.2d 799, 800 (8th Cir. 1985).

as the court's citation to *Baltimore Contractors* attests.[9] *Tokarcik* and *Pantry Pride* are thus fully consistent with one another, and with the analysis suggested herein.

3. The particular circumstances present here render interlocutory appeal especially inappropriate. The order appealed from commanded no more than that petitioner pay respondents a sum of money. It is hornbook law that the temporary loss of money does not ordinarily constitute irreparable harm. *See Sampson v. Murray*, 415 U.S. at 90. Indeed, the district court has already ordered respondents to refund petitioner's previously-made installment payment, to the extent such payment exceeds petitioner's actual withdrawal liability.

Moreover, the final order of the district court has been appealed. That appeal, rather than the one petitioner has asked this Court to review, will determine whether respondents were entitled to enforce their withdrawal liability demand and whether petitioner will receive a refund of any of the money it paid pursuant to the June 25, 1985, order. This Court's consideration of the issue raised in the instant petition will thus have no bearing on ultimate determination of the parties' respective rights and responsibilities. *Compare De Funis v. Odegaard*, 416 U.S. 312, 317 (1974) (controversy mooted by subsequent events rendering "determination by this Court of the legal issues tendered by the parties . . . no longer necessary.").

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[9] As we have noted, *Baltimore Contractors* is the modern source of the "serious, perhaps irreparable, consequence" standard elaborated in *Carson*. Petitioner neglected to point out, in its citation to *Tokarcik*, that the Third Circuit had cited *Baltimore Contractors* in support of the *Tokarcik* language upon which petitioner relies to demonstrate internal "confusion." Pet. 8.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 86-459

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

COOPER INDUSTRIES, INC.,
Petitioner,

v.

I.A.M. NATIONAL PENSION FUND
BENEFIT PLAN A, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONER

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---

REPLY BRIEF FOR THE PETITIONER

I

Respondents are quite wrong when they suggest that the precedent established by the decision below will have only a minimal impact on substantive rights in this or in any other case. To the contrary, the question presented here will be of continuing, vital importance to petitioner and to all other employers who participate in multi-employer pension plans such as that maintained by respondents.

The decision below sanctions the use of judicial process to enforce a *pendente lite* transfer of assets from an

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employer to a pension plan—no matter how substantively illegal the pension plan's withdrawal liability demand may be—and then insulates that enforcement from review on the ground that an employer's "cash flow problems" (Pet. App. A, p. 7a) will never constitute sufficient harm to warrant a preliminary judicial review of the demand's illegality. This follows from the reasoning of the court below: "an order refusing to require interim withdrawal liability payments is appealable because irreparable harm will result; no such harm flows from an order requiring such payments." (Pet. App. A, p. 7a, footnote omitted.)

II

By insulating from review the district court's *sua sponte* order to make interim payments without assessing preliminarily the merits of petitioner's substantial legal defense, the decision below eviscerates 29 U.S.C. §§ 1451 (b) and 1145 and ignores this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982). Taken together, 29 U.S.C. §§ 1451(b) and 1145 state that in any action for interim withdrawal liability payments, the court may require such payments only "to the extent not inconsistent with law." The statute thus mandates judicial inquiry into the lawfulness of interim payments, as this Court has implicitly held in *Kaiser Steel.*

In *Kaiser Steel*, this Court held that "[f]ar from abolishing illegality defenses, § 306(a) [29 U.S.C. § 1145] explicitly requires employers to contribute to pension funds only where doing so would not be 'inconsistent with law.'" *Kaiser Steel*, 455 U.S. at 87-88. Since § 1451(b) requires that a failure to make interim payments be treated "in the same manner" as a delinquent contribution under § 1145, the reasoning of *Kaiser Steel* suggests that an employer must be permitted to raise an illegality defense to an interim payments demand. This the district court refused to allow, and the court below sanctioned that refusal.

The decision below thus prevents employers from ever raising illegality defenses to interim payments demands by inviting pension plans to seek a preliminary injunction through a prayer for relief that contains a label other than "motion for preliminary injunction." [1] At the same time, the decision below permits a pension plan to obtain immediate review of an order denying its request for interim payments—whether the order refuses an injunction or merely has the "practical effect" of doing so—simply by appealing. Thus, a pension plan can always appeal—an employer never can.

III

The court below conceded that an appeal of right will lie from an interlocutory injunctive order entered in response to a specific request. (Pet. App. A, p. 4a n.3), but held that an appeal of right will not lie from an interlocutory injunctive order entered in response to a motion for summary judgment (Pet. App. A, pp. 3a-4a). Respondents seek to reconcile the former with the latter by read-

---

[1] Respondents incorrectly suggest that the district court's *sua sponte* order granted their motion for summary judgment and thus effectively entered a permanent injunction. (*See* Brief in Opposition, p. 7.) In an order entered on May 21, 1986, the district court denied respondents' motion for summary judgment and granted summary judgment for petitioner. (Supp. App., *infra*, p. 1a.) The relief ordered earlier by the district court was preliminary to a determination of the merits—not a permanent merits determination. (Pet. App. B, p. 12a-13a.)

Despite the fact that the district court has granted petitioner's motion for summary judgment and dismissed respondents' entire case, this case is not moot because the district court also "ORDERED that the amount deposited by [petitioner] pursuant to the Court's June 25, 1985 order be applied as a credit against the recalculated withdrawal liability," a liability that has yet to be assessed. (Supp. App., *infra*, p. 2a.) Thus, the district court has retained petitioner's first interim payment in the registry of the court—not ordered a refund as respondents suggest. (*See* Brief in Opp., p. 11.)

ing *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), and *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176 (1955), to say that a preliminary injunction entered in response to a specific request always includes a trial court finding of irreparable harm, while an interlocutory injunction entered in response to any other prayer for relief need not do so.[2] That difference, respondents argue, grants an appeal of right to the enjoined party in the first instance, while denying it in the second.

Putting aside the impropriety of an interlocutory injunction even being entered without a showing of irreparable harm, the fallacy in respondents' argument is that the harm to a plaintiff seeking an injunction cannot logically be the reason why an enjoined defendant is allowed to appeal without its own showing of harm on appeal. The reason lies instead in the congressional recognition that a preliminary injunction is a drastic remedy, entered without full consideration, and ought for that reason to be subject to prompt appellate review. The remedy is equally drastic, and equally preliminary, whether or not it has been specifically requested, and the need for appellate review in both instances is equally great.

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[2] Respondents also suggest that petitioner's argument here is a mere "afterthought," made because of its failure to show irreparable harm. (*See* Brief in Opp., p. 4 n.4, 9.) As respondents well know, neither they nor the Pension Benefit Guaranty Corporation challenged the jurisdictional basis for petitioner's appeal until the court below *sua sponte* raised that issue at oral argument. As respondents also know, petitioner strongly asserted at oral argument that it was not required to show irreparable harm to appeal from the district court's injunction under 28 U.S.C. § 1292(a)(1). Petitioner's position is not an afterthought—it is a position consistently maintained since the issue arose.

CONCLUSION

The question presented, though narrow, is one which is occurring frequently. In the multiemployer context, the question will recur because of the way in which the decision below denies substantive rights. Proper judicial administration urges that it be settled by a decision of this Court, thus avoiding repetitive litigation of this procedural question in the lower courts.

The Petition for Certiorari should be granted.

Respectfully submitted,

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October 28, 1986

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3346

I.A.M. NATIONAL PENSION FUND BENEFIT PLAN A, *et al.*,
Plaintiffs

v.

COOPER INDUSTRIES, INC.,
Defendant

[Filed May 21, 1986]

ORDER

Upon consideration of plaintiffs' motion for summary judgment; defendant's cross-motion for summary judgment; additional memoranda, affidavits and exhibits filed by both parties; the Pension Benefit Guaranty Corporation's *amicus curiae* brief; the entire record herein; and for the reasons set forth in the accompanying opinion, it is by the Court this 21st day of May 1986,

ORDERED that defendant's motion for summary judgment is granted; it is further

ORDERED that plaintiffs' motion for summary judgment is denied; it is further

ORDERED that plaintiffs' 29 U.S.C. § 1399(b)(1) notice of liability, dated July 27, 1984, is invalid in its present form; it is further

ORDERED that plaintiffs may send another 29 U.S.C. § 1399(b)(1) notice consistent with the attached opinion; it is further

ORDERED that the amount deposited by defendant pursuant to the Court's June 25, 1985, order be applied as a credit against the recalculated withdrawal liability; and it is further

ORDERED that this case is dismissed.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge